In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–103

THOMAS LLERENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment filed in the United States District Court for the Southern District of Florida charged petitioner and Amado Lopez with conspiracy to possess and distribute two kilograms of cocaine (count 1), in violation of 21 U.S.C. 846. In addition, Lopez was charged with distributing the cocaine (count 2) and with distributing 3.6 grams of heroin two months prior thereto (count 3), in violation of 21 U.S.C. 841 (a)(1). Following a trial by jury, both defendants were convicted as charged. On October 5, 1971, petitioner was sentenced to imprisonment for eighteen months. The court of appeals affirmed (Pet. App. A; 459 F. 2d 949). A petition for rehearing was denied on June 19, 1972; this petition was filed on July 18, 1972.

The evidence, which is not in dispute, shows that on May 6, 1971, Lopez gave an informant a sample of heroin. On July 3, the informant received two kilograms of cocaine from Lopez. Two weeks later an undercover narcotics agent arranged to meet with Lopez at a hotel in order to pay for the cocaine. At the meeting both petitioner and Lopez were present, and the agent made a partial payment, agreeing to pay the remainder later. Petitioner stated that he was very anxious about getting paid because certain unnamed persons would kill anyone who crossed them.

1. Petitioner claims prejudice in joining him with Lopez at a single trial which involved a count not connected to petitioner, *i.e.*, count 3 relating to the heroin transaction. The evidence relating to that count was distinct although it did serve to explain the later dealings. The court properly instructed the jury to determine the guilt or innocence of each defendant separately. There is no reason to speculate that the jury failed to heed this charge. *Gordon* v. *United States*, 438 F. 2d 858, 878–879 (C.A. 5), certiorari denied, 404 U.S. 828.

2. Petitioner also challenges the constitutionality of the Comprehensive Drug Abuse Prevention and Control Act, under which he was convicted, because it does not require proof of a nexus with interstate commerce as a condition for conviction of a federal offense. The constitutional question is akin to the one advanced unsuccessfully by the defendant in *Perez* v. *United States*, 402 U.S. 146, where this Court reaffirmed prior rulings that the Commerce Clause can reach wholly intrastate activities where, as a class, they have a sub-

stantial effect upon interstate commerce. This is so whether or not an individual situation can be shown to bear such a connection. There can be little doubt that the statutory scheme which includes 21 U.S.C. 841 and 846 deals with matters having a profound effect on interstate commerce. This determination by Congress, reached after extensive examination into the vice of narcotics trafficking, has been codified in the form of explicit legislative findings. See 21 U.S.C. 801. In light of the rational basis for the particularized Congressional findings, the Comprehensive Drug Abuse Prevention and Control Act is valid federal legislation.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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